RRC2 – Rule 3-200 [3.1]
Post-Agenda E-mails, etc. – Revised (February 16, 2016)
Drafting Team: Martinez (Lead), Kornberg, Harris

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January 12, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

The Office of Chief Trial Counsel's comments on the rules under consideration at the January meeting are attached. Please review them in preparation for the discussion at the January meeting.

Attached:
RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.docx
RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.pdf

January 12, 2016 OCTC Memo to RRC2:

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G. Rule 3-200: Prohibited Objectives of Employment

OCTC does not recommend any revisions to rule 3-200.

January 16, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

A few thoughts ---

1) The proposed Rule omits the underlined language found in the Model Rule, and I wonder whether this creates a substantive difference between the two: "... the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, ..."

2) The first Commission referred to writ proceedings in a Comment while this proposal has no reference. Doesn't that create an unintended gap in this Rule?

3) Also, doesn't "take an appeal" apply the Rule only to appellant's counsel?

February 12, 2016 OCTC Memo to RRC:

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B. Rule 3-200 [Prohibited Objectives of Employment]

OCTC does not recommend any revisions to rule 3-200. (See January 12, 2016 comment.)

February 14, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

It is reasonably clear that current rule 3-200, the first Commission's Rule 3.1, and MR 3.1 apply only in the litigation context. This proposed Rule, seemingly would make the Rule applicable in administrative proceedings by introducing the term "tribunal".

It might be possible to read the phrase "bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal" as encompassing only litigation, but if that were the intended meaning there would be no need to add "tribunal" to the Rule and import administrative proceedings into the Rule due to the expansive definition of "tribunal". Also, the word "litigation" in the quoted language certainly does not modify "appeal" and easily could be read as not modifying "action" or "defense". The consequence is that a Rule that now and

historically has been understood as dealing with a lawyer's obligations as an officer of the court in the conduct of litigation could, for example, be stretched to, say, an appeal from an administrative decision to grant or deny a building permit. It remains my view that the limitations on advocacy that are essential to the proper functioning of the court have no place in the quite different arena of political advocacy and governmental petitioning.

The current rule is not broken and does not need to be fixed.

February 14, 2016 Martinez Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

That was not our intent. The Supreme Court stated that it wanted to limit the rule to "tribunals" when it rejected the RRC-1 version of Rule 3.1. See attached. We were following orders. Whether the Court viewed tribunals as including administrative proceedings is unclear.

The policy question is whether the rule should include proceedings besides judicial proceedings. We could delete the word "tribunal" but that may not resolve any perceived ambiguity. The word "litigation" also can be read to apply outside judicial proceedings. The RRC-1 version used the word "proceeding" which seems even broader than "tribunal."

I don't think the rule would chill advocacy in any event because of the requirement that the action be brought without probable cause which means that "no reasonable attorney" would have believed the claim was tenable. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886.) It's a rather high bar. The scienter requirement of malice/harassment also mitigates against chilling advocacy. The annotations under this rule also do not reveal any opinions involving discipline. So we may be debating the number of angels dancing on the head of a pin.

Attached:
RRC2 - [3-200][3.1] - RRC1 - 04-15-14 SCT Letter re RRC1 Rule 3.1

> ***April 15, 2014 Letter from Frank McGuire, Supreme Court Administrator, to Starr Babcock & Mary Yen (OGC, State Bar) re proposed Rule 3.1:***
>
> The court has asked that I refer the Proposed Revision to the Rule of Professional Conduct, rule 3.1, submitted October 3, 2013, with its request that the State Bar redraft this proposed rule. The language of the redrafted submission should limit the scope of the rule to attorney conduct in proceedings before a tribunal. Additionally, the proposed rule should retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 3-200, its predecessors, and Business and Profession Code section 6068, subdivision (g). The court has further requested that the State Bar solicit additional public comment regarding the revised proposed rule prior to its resubmission to the court.